BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2004-316-C

In the Matter of	)	
	)	**ORDER GRANTING**
Petition of BellSouth Telecommunications, Inc. to Establish	)	**PETITION FOR**
Generic Docket to Consider Amendments to Interconnection	)	**EMERGENCY RELIEF**
Agreements Resulting from Changes of Law Docket	)	

I. INTRODUCTION

This matter comes before the Public Service Commission of South Carolina (the "Commission") on the Petition for Emergency Relief (the "Emergency Petition") filed by NuVox Communications, Inc., Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Charleston, LLC, Xspedius Management Co. of Columbia, LLC, Xspedius Management Co. of Greenville, LLC, Xspedius Management Co. of Spartanburg, LLC, KMC Telecom III, LLC, KMC Telecom V, Inc. (collectively known as the Joint Petitioners). The Joint Petitioners, which are competitive local exchange carriers (CLECs), request that the Commission issue an Emergency Declaratory Ruling finding that BellSouth Telecommunications, Inc. (BellSouth) may not unilaterally amend or breach its existing interconnection agreements with the Joint Petitioners or the Abeyance Agreement entered into between BellSouth and the Joint Petitioners (the Parties).

The Joint Petitioners bring the instant matter before the Commission in light of BellSouth's February 11, 2005 Carrier Notification and February 25, 2005 Revised Carrier Notification stating that certain portions of the Federal Communications Commission's ("FCC's) *Triennial Review Remand Order* (TRRO) regarding new orders

for de-listed Unbundled Network Elements (new adds) are self-effectuating as of March 11, 2005.

II. BACKGROUND

1. On February 11, 2004, Joint Petitioners filed jointly with this Commission a petition for arbitration of an interconnection agreement with BellSouth. The matter was assigned Docket No. 2004-42-C.

2. On March 2, 2004, the U.S. Court of Appeals for the D.C. Circuit in *United States Telecom Ass'n v. FCC* ("USTA II") [1] affirmed in part, and vacated and remanded in part, the FCC's *Triennial Review Order* ("TRO"), which obligated ILECs to provide requesting telecommunications carriers with access to certain UNEs.[2] The D.C. Circuit initially stayed its USTA II mandate for 60 days. The stay of the USTA II mandate later was extended by the D.C. Circuit for a period of 45 days, until June 15, 2004 on which date the D.C. Circuit's USTA II mandate issued. At that time, certain of the FCC's rules applicable to BellSouth's obligation to provide CLECs with UNEs were vacated.

3. On June 30, 2004, BellSouth and Joint Petitioners entered into an Abeyance Agreement which was later memorialized in a July 16, 2004 Joint Motion to Withdraw Petition for Arbitration ("Abeyance Agreement") with the expectation that the FCC would soon issue additional and new rules governing ILECs' obligations to provide

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[1] 359 F.3d 554 (D.C. Cir. 2004).

[2] *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147 (rel. Aug. 21, 2003)("Triennial Review Order") ("TRO").

access to UNEs.[3] Specifically, the Abeyance Agreement provided for an abatement of the Parties' ongoing arbitration in order to consider *inter alia* how the post-USTA II regulatory framework should be incorporated into the new agreements being arbitrated.[4] The Parties agreed therein to avoid negotiating/arbitrating change-of-law amendments to their existing interconnection agreements and agreed instead to continue to operate under their existing interconnection agreements until their arbitrated successor agreements become effective.[5]

4. The Commission issued an order granting the Parties' Abeyance Agreement (*i.e.,* the Joint Motion) on October 6, 2004.

5. On August 20, 2004, the FCC released its Interim Rules Order, which held *inter alia* that ILECs shall continue to provide unbundled access to switching, enterprise market loops and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004.[6] The FCC required that those rates, terms and conditions remain in place until the earlier of the effective date of final unbundling rules, or six months after publication of the Interim Rules Order in the Federal Register.[7]

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[3] The Abeyance Agreement was filed in the form of a Joint Motion in Docket No. 2004-42-C (filed July 16, 2004).

[4] Abeyance Agreement at Paragraph 5.

[5] *Id.*

[6] *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order and Further Notice of Proposed Rulemaking, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Aug. 20, 2004) ("Interim Rules Order").

[7] *Id.* ¶ 21.

6. On February 4, 2005, the FCC released the TRRO, including its latest Final Unbundling Rules.[8] In the TRRO, the FCC found *inter alia* that requesting carriers are not impaired without access to local switching and dark fiber loops. The FCC also established conditions under which ILECs would be relieved of their obligation to provide pursuant to section 251(c)(3) unbundled access to DS1 and DS3 loops, as well as DS1, DS3 and dark fiber dedicated transport.

7. In the section of the TRRO entitled "Implementation of Unbundling Determinations" the FCC held that "incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act."[9]

8. The TRRO will become an effective FCC order on March 11, 2005.[10]

9. On February 11, 2005, BellSouth issued a Carrier Notification in which BellSouth alerted carriers to the issuance of the TRRO and made certain statements regarding the effects of that order. Specifically, BellSouth claimed that "with regard to the issue of 'new adds'… the FCC provided that no 'new adds' would be allowed as of March 11, 2005, the effective date of the TRRO."[11] BellSouth further claimed that "[t]he FCC clearly intended the provisions of the TRRO related to 'new adds' to be self-effectuating," *i.e*., "without the necessity of formal amendment to any existing interconnection agreements."[12]

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8 *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order on Remand, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Feb. 4, 2005)("Triennial Review Remand Order") ("TRRO").

9 *Id.* ¶ 233.

10 *Id.* ¶ 235.

11 Carrier Notification at 1.

12 *Id.* at 2.

10. BellSouth stated that as of March 11, 2005 it would reject UNE-P orders and orders for high capacity loops and transport where it has been relieved of its obligation to provide such UNEs, except where such orders are certified in accordance with paragraph 234 of the TRRO.[13] BellSouth also announced that it would not accept new orders for dedicated transport "UNE entrance facilities" or "UNE dark fiber loops" under any circumstances.[14]

11. On February 28, 2005, BellSouth issued a revised Carrier Notification indicating that it would refuse to provision copper loops capable of providing HDSL on March 11, 2004, as well.

12. On February 14, 2005, BellSouth filed a submission in Docket No. 2004-316-C alleging that the "TRRO's provisions as to 'new adds' constitute a generic self-effectuating change for all interconnection agreements, and they are effective March 11, 2005, without the necessity of formal amendments to any existing interconnection agreements."[15]

III. JURISDICTION- APPLICABLE LAW

1. The Commission has jurisdiction to hear and rule upon the Emergency Petition pursuant to S.C. Code Ann. § 58-3-140 (vesting the Commission with "power and jurisdiction to supervise and regulate the rates and service of every public utility in this State"), S.C. Code Ann. § 58-3-170 (conferring jurisdiction upon the Commission to "supervise and fix all agreements, contracts, rates . . ." among telephone companies, S.C. Code Ann. § 58-9-1080 (authorizing the Commission to hear complaints involving

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13 *Id.*
14 *Id.*
15 BellSouth Submission, at 1-2.

telephone utilities), and S.C. Code Ann. § 58-9-280 (conferring jurisdiction on the Commission to provide for "unbundling of network elements").

2. The Commission also has jurisdiction under §251(d)(3) of the Act (conferring authority to State commissions to enforce any regulation, order or policy that is consistent with the requirements of Section 251) with respect to the matters raised in the Emergency Petition.

III. DISCUSSION

A. The TRRO is not "self-effectuating" in the manner claimed by BellSouth

1. BellSouth asserts that the TRRO is self self-effectuating with regard to "new adds." We disagree, and instead conclude that the TRRO clearly intends that the Parties negotiate the changes occasioned thereby, and come to this Commission to arbitrate any issues upon which the Parties cannot agree.

2. In particular Paragraph 233 of the TRRO states the following:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

(TRRO § 233, footnotes omitted).

3. Section 252 of the Act requires negotiations and state commission arbitration of issues that cannot be resolved through negotiation. Thus, we cannot agree with BellSouth that this process is "self effectuating."

4. Similarly, we do not agree with BellSouth's contention that the TRRO reformed or abrogated the change of law provisions contained in the Parties' interconnection agreements.

5. Our reading of the TRRO evidences no "different direction" with respect to "new adds" as claimed by BellSouth. BellSouth argues that the FCC can and did modify existing interconnection agreements in the manner alleged in its Carrier Notification.

6. In support of its contention that the FCC can modify existing interconnection agreements, BellSouth cites the *Mobile-Sierra* doctrine. However, the *Mobile-Sierra* doctrine does not apply to this matter. The FCC has expressly found that "the *Mobile-Sierra* analysis does not apply to interconnection agreements reached pursuant to sections 251 and 252 of the Act, because the Act itself provides the standard of review of such agreements." *IDB Mobile Communications, Inc. v. COMSAT Corp*., 16 FCC Rcd 11475 at note 50 (May 24, 2001).

7. Even if the doctrine had not been explicitly excluded from the instant case, we find simply no evidence that the FCC employed the *Mobile-Sierra* doctrine and made the requisite public interest findings for doing so in the TRRO. There is no express statement in the TRRO that says that the FCC intended to reform existing interconnection agreements. And there is no discussion of why negating certain terms of existing

interconnection agreements is compelled by the public interest. Instead, the FCC stated quite plainly in Paragraph 233 of the TRRO that the normal section 252 negotiation/arbitration process applies.

8. Regarding UNE-P, BellSouth appears to rely on Paragraphs 199 and 277 of the TRRO, which state (as quoted by BellSouth):

> The transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching. (TRRO ¶ 199).
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> This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3) except as otherwise specified in this Order. (TRRO ¶ 227).

9. However, BellSouth has appeared to ignore Paragraph 233, (cited above), which clearly provides that the parties must use the Section 252 process in order to implement the changes mandated by the TRRO.

10. This decision by the FCC to employ the traditional process by which changes of law are implemented is reflected in several instances throughout the TRRO.[16] With regard to high capacity loops, the FCC held that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes."[17] The FCC also stated that "we expect

[16] The FCC also recognized that, pursuant to section 252(a)(1), carriers are free to negotiate alternative arrangements that would result in standards governing their relationships that differ from the rules adopted in the *TRRO*. *See id.* ¶¶ 145, 198, 228.

[17] *Id.* ¶ 196.

incumbent LECs and requesting carriers to negotiate appropriate transition mechanisms for such facilities through the section 252 process."[18]

11. With regard to high capacity transport, the FCC also stated that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes."[19] And the FCC also stated that "we expect incumbent LECs and requesting carriers to negotiate appropriate transition mechanisms for such facilities through the section 252 process."[20]

12. With regard to UNE-P arrangements, the FCC also held that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes."[21]

13. Thus, the FCC did not unilaterally modify the interconnection agreements that have been approved by this Commission, or decree that the changes-of-law that would become effective on March 11, 2005 would automatically supplant provisions of existing interconnection agreements as of that date.

14. We note that the FCC's position in the TRRO also mirrors the position it took in the TRO. In the TRO, the FCC declined Bell Operating Company ("BOC") requests to override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with the renegotiation of contract provisions,

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18 *Id.* at note 519.
19 *Id.* ¶ 143.
20 *Id.* at note 399.
21 *Id.* ¶ 227.

explaining that "[p]ermitting voluntary negotiations for binding interconnection agreements is the very essence of section 251 and section 252."[22]

15. Similarly, we are not persuaded by BellSouth's contention that Paragraph 235 of the TRRO supports its view that the FCC intended to reform the Parties' interconnection agreements. The entire sentence (that was quoted only in part by BellSouth) reads "[g]iven the need for prompt action, the requirements set forth here shall take effect on March 11, 2005, rather than 30 days after publication in the Federal Register." TRRO ¶ 235. Clearly, the FCC sought by this sentence only to make the TRRO effective on March 11, 2005 "rather than 30 days after publication in the Federal Register," and in so doing announced no policy that would short circuit the Section 252 negotiation and arbitration process.

16. We read the TRRO to clearly and unambiguously require parties to amend their interconnection agreement pursuant to change of law processes. As stated above, the Commission disagrees with BellSouth's interpretation of the TRRO with respect to "new adds." The TRRO's unbundling decisions and transition plans do not "self effectuate" a change to the Parties' existing interconnection agreements, and will not govern the Parties' relationships until such time as – and only to the extent – that the agreements are modified to incorporate such unbundling decisions and transition plans.

B. The Effect of the *Abeyance Agreement*

17. Because we grant the Emergency Petition as set out below based upon the language of the *TRRO*, we need not reach the question of whether the *Abeyance*

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[22] *TRO* ¶ 701.

Agreement has been unilaterally amended or breached by BellSouth. However, we remind the parties of the duty to negotiate in "good faith" pursuant to Section 251(c)(1) of the Act. Further, we would underscore the importance of good faith negotiations to the arbitration process set out in Section 252 of the Act. Finally, the Commission will hold the parties to the agreement they concluded in the event that they are unable to resolve their differences through the negotiation process.

III. CONCLUSIONS

1. The provisions of the TRRO are not self-effectuating but rather are effective only at such time as the Parties' existing interconnection agreements are superseded by subsequent interconnection agreements resulting from negotiations or a future arbitration Docket heard by this Commission.

2. The TRRO mandates that the Parties shall continue to operate under their Commission approved interconnection agreements until the section 252 process is employed to arrive at new and modified agreements.

IT IS THEREFORE ORDERED THAT:

1. The Parties shall continue to operate under their Commission approved interconnection agreements until the section 252 process is employed to arrive at new and modified agreements.

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2. BellSouth shall not, on March 11, 2005 and continuing until the Parties' interconnection agreements have been replaced, return orders, submitted by any of the Joint Petitioners, for new UNE-P for clarification and resubmission based upon the rationale set out in BellSouth's Carrier Notifications SN91085039 or SN91085051.

3. BellSouth shall not, on March 11, 2005 and continuing until the Parties interconnection agreements have been replaced, return orders, submitted by any of the Joint Petitioners for new unbundled high capacity loops and unbundled dedicated interoffice transport in non-impaired areas of South Carolina, for clarification and resubmission based upon the rationale set out in BellSouth Carrier Notifications SN91085039 or SN91085051.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Chairman

ATTEST:

Executive Director

(SEAL)